**Order 96-5-26**

**UNITED STATES OF AMERICA**
**DEPARTMENT OF TRANSPORTATION**
**OFFICE OF THE SECRETARY**
**WASHINGTON, D.C.**

SERVED: May 21, 1996

Issued by the Department of Transportation
on the 20th day of May, 1996

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| Joint Application of<br><br>**DELTA AIR LINES, INC.**<br>**SWISSAIR, SWISS AIR TRANSPORT COMPANY, LTD.**<br>**SABENA S.A., SABENA BELGIAN WORLD AIRLINES, and**<br>**AUSTRIAN AIRLINES, ÖSTERREICHISCHE LUFTVERKEHRS AG**<br><br>for approval of and Antitrust Immunity for Alliance Agreements pursuant to 49 U.S.C. §§ 41308 and 41309 | **Docket OST-95-618** |

## ORDER TO SHOW CAUSE

Delta Air Lines, Inc. ("Delta"), Swissair, Swiss Air Transport Company, Ltd. ("Swissair"), Sabena S.A., Sabena Belgian World Airlines ("Sabena") and Austrian Airlines, Österreichische Luftverkehrs AG ("Austrian") have applied for approval and antitrust immunity under 49 U.S.C. §§ 41308 and 41309, for three separate and parallel Cooperation Agreements and a Coordination Agreement among the four Joint Applicants covering the coordination of the three Cooperation Agreements (collectively referred to as the "Alliance Agreements") whereby the joint applicants would integrate their services and operate with common business objectives.

We have tentatively determined to grant approval of and antitrust immunity for the Alliance Agreements among the four airlines. We have, however, tentatively found it appropriate to condition our approval, as more fully explained below. We propose to withhold approval of antitrust immunity with respect to services relating to fares and capacity for particular categories of U.S. point of sale local passengers in the Atlanta-Brussels, Atlanta-Zurich, and Cincinnati-Zurich markets, as agreed between the applicants and the Department of Justice (DOJ).[1] We further propose as a condition to require the Joint Applicants to withdraw from all

[1] The Department will, in cooperation with the Department of Justice, review this condition within eighteen months to determine whether it should be discontinued or modified.

International Air Transport Association ("IATA") tariff coordination activities affecting through prices between the United States and the foreign homelands of the alliance partners and in other markets described below. We also propose to direct the applicants to file all subsidiary and or subsequent agreement(s) with the Department for prior approval. We also tentatively find it in the public interest to direct the applicants to resubmit for renewal their variously styled alliance agreement(s) in five years. In addition, we also tentatively find it in the public interest to direct Swissair, Sabena, and Austrian to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic (O&D Survey) Data for all passengers to and from the United States (similar to the O&D Survey Data reported by Delta). We are providing the Joint Applicants and other interested parties the opportunity to comment on our tentative findings in this order.

We tentatively find that, subject to the conditions and limitations specified, our approval will advance important public benefits. Approval would permit the four airlines to operate more efficiently and provide better service to the U.S. traveling and shipping public, and would allow Delta to compete more effectively with other global alliances. With our proposed limitations, our proposed action will be consistent with our policy of facilitating competition among emerging mutinational airline networks, where those networks will lead to lower costs and enhanced service for U.S. and foreign consumers. We fully recognize the trend toward expanding international airline networks as a response to the underlying network economics of the airline industry, and our action here will allow our airlines to play a leading role in the globalization of that industry.

Our proposed action in this order is consistent with our approval and grant of antitrust immunity for the alliance between Northwest Airlines and KLM.[2] Northwest and KLM have integrated their operations so that they operate very much like a single airline. Our experience with that alliance has demonstrated that such alliances between U.S. and foreign airlines can substantially benefit consumers. The alliance between Northwest and KLM has enabled the two airlines to operate more efficiently, and to provide integrated service in many more markets than either partner could serve individually.[3] As we have also tentatively found with respect to United and Lufthansa, we expect that the alliance between Delta and its partners will provide comparable benefits to consumers.[4] Our assessment of the competitive and public interest factors for the proposed alliance is very similar to our judgment on these issues for the Northwest-KLM alliance, as well as to our tentative United-Lufthansa decision.

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2 Orders 93-1-11 and 92-11-27.

3 Northwest's Special Code-Share O&D Passenger Survey Data Reports filed with the Department of Transportation.

4 *International Aviation: Airline Alliances Produce Benefits, but Effect on Competition is Uncertain* (GAO/RCED-95-99, April 6, 1995); and *A Study of International Airline Code Sharing*, Gellman Research Associates, Inc., December 1994.

In granting airlines immunity from the operation of our antitrust laws so that they may form efficient alliances, we tentatively believe it is not in the public interest to permit alliances simultaneously to participate with other alliances in certain price-related aspects of antitrust-immunized IATA tariff coordination. This "dual" immunity would raise unacceptable risks to competition and consumers. We therefore are proposing to condition our approval and grant of antitrust immunity in this case by requiring the applicants to withdraw from participation in any IATA tariff coordination activities that discuss any proposed through fares, rates, or charges applicable between the United States and Austria, Belgium, or Switzerland, or between the United States and any other countries designating a carrier that has been granted antitrust immunity or renewal thereof by the Department for participation in similar alliances with a U.S. carrier.[5]

## I. Background

### A. The Open Skies Accords with Austria, Belgium and Switzerland

While we prefer that U.S. carriers serve international markets without being subject to limitations, our bilateral agreements with some foreign countries impose restrictions on airline services offered by U.S. carriers, typically by limiting the frequency and capacity that may be offered, routes that may be served, or the number of U.S. carriers that may serve a route. Many countries also impose restrictions on the ability of U.S. carriers to establish fares at management's discretion. These restrictions limit carriers' ability to respond to market demands and thereby prevent the public from obtaining the best possible airline service.

Open Skies arrangements with foreign countries assure the most liberal operating environment for air services and give any carrier from either country the right to serve any route between the two countries and beyond. These agreements place no limits on airline capacity and carriers are free to charge any price unless both countries disapprove.[6] The applicants' national authorities undertook the ground-breaking step of joining the United States in open skies aviation relations. They were thus in the forefront of progressive European nations that have chosen open market competition in aviation over a tightly constrained, highly restricted and regulated, operating environment.

We exchanged diplomatic notes finalizing the Open Skies accords with Switzerland on June 15, 1995; with Belgium on September 5, 1995; and with Austria on June 14, 1995. These accords allow any U.S. carriers to serve any point or points in Austria, Belgium, or Switzerland from any point or points in the United States and allows any Austrian, Belgian, or Swiss carrier to serve any point or points in the United States from any point or points in its home country.

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5 This condition would also apply to prices between the United States and the Netherlands, and between the United States and Germany, if antitrust immunity is finalized in Docket OST-96-1116, see Show-Cause Order 96-5-12. *See* also May 8, 1996, letter in this docket from Northwest and KLM indicating their willingness to limit voluntarily their participation in IATA.

6 *See* Order 92-8-13, August 5, 1992.

As the U.S.-Netherlands accord has demonstrated, these Open Skies regimes should also encourage more competitive service to Austria, Belgium, and Switzerland. It is our expectation that these accords will encourage other European countries to seek similar liberal aviation arrangements with us. Since, under the open skies agreements, the price and service quality of U.S.-Austria, Belgium, and Switzerland airline service will be disciplined by market forces, rather than by restrictive bilateral agreements, U.S.-Europe travelers will have an incentive to choose the airline services available on routes from the United States to Austria, Belgium, and Switzerland (as well as our other Open Skies partners) and beyond, instead of other transatlantic routes.

Among other things, the Open Skies accords provide that the national carriers of the contracting countries may enter into marketing arrangements such as blocked-space, code-sharing, or other cooperative arrangements, if all airlines (1) hold the appropriate authority, and (2) meet the requirements normally applied to such arrangements. Furthermore, while recognizing the importance that certain trading partners attached to the issue of antitrust immunity for operational and commercial cooperation and integration between each of their airlines and U.S. airlines, the U.S. delegations emphasized in the Memoranda of Consultations (MOCs) with Austria and Belgium that the subject was outside the scope of the respective Open Skies initiatives. The U.S. delegations stressed that any request for antitrust immunity would have to be submitted for approval to the Department of Transportation, which would consider such applications on a case-specific basis, taking into account U.S. law and international transportation policy at the time such a request is filed.

### B. The Joint Applicants' Operational Relationships

The Joint Applicants currently operate code-sharing services in the following 12 nonstop and single-plane transatlantic markets:

Austrian-Delta

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| New York-Vienna: | Operates daily by Austrian (nonstop service). |
| Washington-Vienna: | Operates six days a week by Austrian (1-stop service via Geneva). |

Austrian-Delta-Swissair

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| Washington-Geneva: | Operates five days a week by Austrian (nonstop service). |

Delta-Sabena

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| Atlanta-Brussels: | Operates daily by Delta (nonstop service). |
| Boston-Brussels: | Operates six days a week by Sabena (nonstop service). |
| Chicago-Brussels: | Operates five days a week by Sabena (nonstop service). |
| New York-Brussels: | Operates daily by Sabena (nonstop service). |

Delta-Swissair

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| Atlanta-Zurich: | Operates daily by Swissair (nonstop service). |
| Chicago-Zurich: | Operates six days a week by Swissair (1-stop service via JFK). |
| Cincinnati-Zurich: | Operates five days a week by Delta (nonstop service). |

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| New York-Geneva: | Operates six days a week by Swissair (nonstop service). |
| New York-Zurich: | Operates daily by Swissair (nonstop service). |

The Joint Applicants' current code-sharing services are operated in conjunction with blocked-space agreements, where the code-sharing carrier purchases a block of seats on the operating carrier's flights. The operating carrier and its code-sharing partner(s) then market their respective seats independently, in competition with each other, in order to maximize their own revenue over these routes. Delta and its alliance partners thus engage in head-to-head price competition over these code-sharing routes.

### C. Cross-Ownership Interests Among the Applicants

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| Austrian: | The Austrian Government owns about 51.9% of Austrian Airlines, and Swissair holds a 10% equity stake in the carrier. |
| Delta: | Swissair holds an equity interest of about 5% of Delta's voting stock. |
| Sabena: | Swissair holds about 49% of Sabena's voting stock. |
| Swissair: | Delta holds an equity interest of about 5% of Swissair's voting stock. |

## II. The Delta, Austrian, Sabena, and Swissair Joint Venture

The applicants' proposed arrangement consists of three discrete but parallel cooperation agreements between (1) Delta and Austrian, (2) Delta and Sabena, and (3) Delta and Swissair. Additionally, the applicants have a fourth, overarching agreement among themselves that coordinates the three cooperation agreements.

The agreements provide for the establishment of joint marketing programs (including frequent-flyer programs, third-party marketing, and advertising); coordinated flight schedules, route networks, and route planning; revenue pooling and sharing in particular markets; coordinated traffic commissions programs; standardization of contracts with suppliers, travel agents, general sales agents, and other organizations and individuals; joint management committees to oversee project development, strategic planning, and pricing; joint accounting and information systems, including sharing of marketing, fare, frequent-flyer, cost, and revenue data; uniform service standards; coordinated pricing and inventory control; joint identity, including harmonization of existing identities, colors, and service marks, and the use of joint aircraft colors, uniforms, aircraft interiors, and other facilities and equipment; and coordinated cargo programs. In short, these various agreements, if approved, will allow the four airlines to operate effectively as a single firm, while retaining their individual identities as reflected by their ownership and control.

## III. The Application and Responsive Pleadings

### A. The Joint Applicants' Request [7]

On September 8, 1995, Delta, Austrian, Sabena and Swissair filed a request seeking approval of and antitrust immunity for certain separate and parallel cooperation agreements, collectively referred to herein as the "Alliance Agreements," for a five-year term. The joint applicants propose to expand their existing cooperative marketing relationships, which have involved point-to-point code-share arrangements on a limited number of routes, by entering into a more comprehensive business alliance that would cover the coordination of three parallel Cooperation Agreements. The applicants state that the purpose of the Agreements is to establish a contractual and legal framework that will allow the four airlines, while retaining their separate corporate and national identities, to establish the proposed Alliance and cooperate to the extent necessary to create a "seamless air transport system." The applicants maintain that if the Alliance Agreements are approved and immunized, they will proceed to negotiate and conclude operating accords that will provide for specific coordination and integration mechanisms regarding scheduling, marketing, planning, joint services and other related matters.[8]

The applicants assert that the Alliance Agreements will produce substantial public benefits. They state that the alliance will create network synergies by (1) linking the U.S. and European hubs of the alliance partners, (2) producing cost efficiencies and savings through integration and coordination, which can be passed on to consumers in the form of lower fares and improved services, and (3) increasing transatlantic competition. Conversely, the applicants argue that denial of their request will prevent consummation of the Alliance Agreements and thereby deny to the public the benefits otherwise obtainable.[9]

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[7] By Order 95-9-27, issued September 25, 1995, we directed the Joint Applicants to provide additional information to supplement their request. By Notice dated October 16, 1995, we found that the record of this case was substantially complete, and we established procedural deadlines. By Order 95-11-5, issued November 3, 1995, we granted the Joint Applicants' request for confidential treatment for certain documents and information, limiting access to these data in certain respects. We also extended the procedural schedule for filing answers and replies to the application.

[8] The applicants state that they have not made such agreements because, in the absence of immunity, such arrangements would subject the carriers to the risk of antitrust litigation. Application at 10, and 41-42.

[9] The applicants maintain that uniform and fair application of regulatory policy requires the Department to accord the same legal authority (specifically, the grant of antitrust immunity) to the Joint Applicants, as that accorded to Northwest and KLM. The applicants state that without the grant of antitrust immunity, they will not be able to compete on a "level playing field" with the Northwest-KLM alliance in the global marketplace. The applicants cite an April, 1995, Government Accounting Office Report that found that (1) the Northwest-KLM alliance increased traffic over Northwest's flights by about 200,000 passengers in 1994; (2) the combined market share of KLM and Northwest increased from 7% before the alliance to 11.5% in 1994; (3) the antitrust immunized alliance infused up to $175 million in added revenue to Northwest in 1994 alone, one-third of Northwest's total transatlantic passenger revenues; (4) KLM earned $100 million in added revenues, equal to 18% of its transatlantic passenger revenues; and (5) "the alliance's success is due to the broad scope of the code-

The applicants maintain that these public interest benefits are unattainable individually, due to existing bilateral barriers and the financial burden required to set up meaningful hubs, or through merger, because U.S. and foreign laws concerning nationality and ownership preclude the merger of airlines of different nationalities.[10] Therefore, in the absence of a merger, the joint venture contemplated by the Alliance Agreements requires, in the applicant' view, that they craft business understandings that will expose them to the risk that such coordinated activities would be challenged on antitrust grounds.[11] The applicants state that they would be unwilling to implement the Alliance Agreements unless they are shielded from antitrust liability, and that in the absence of immunity the collaboration and coordination that are necessary to integrate their respective networks into an effective multi-hub U.S.-Europe alliance are impossible.[12]

The applicants submit that the grant of antitrust immunity will advance U.S. international aviation policy objectives by accelerating liberalization of the U.S.-Europe marketplace, thus achieving an important goal of the Department's "Open Skies" initiative.[13] Further, the applicants assert that the proposed Alliance Agreements are consistent with the Department's

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sharing network and the degree of integration the airlines have achieved." *See International Aviation*, GAO Report, various pages.

10 Delta states that it has spent "hundreds of millions of dollars" to acquire and sustain a North Atlantic route system, yet it only operates flights to eleven European cities from Frankfurt, its European "hub." These European operations, when compared to the hub operations of other European carriers such as Lufthansa at Frankfurt, British Airways at London, Air France at Paris, and KLM at Amsterdam, are insignificant. Delta contends that regulatory barriers, restrictive bilateral agreements with third countries, as well as economic factors also impair its ability to establish a truly competitive hub network at other European cities. Therefore, Delta claims to lack the ability to compete effectively against the major European airlines for transatlantic traffic originating in Europe.

11 The applicants state that the Alliance Agreements will permit them to compete more effectively against larger networks created by competing global alliances. They further state that the Alliance Agreements will allow the airlines to develop mechanisms to enhance efficiencies, reduce costs and provide better service to the traveling and shipping public by providing for: increased frequencies and enhanced on-line services; expanded access to the alliance partners' beyond- and behind-gateway markets; coordinated hubs and transatlantic segments; expansion of discount fares; availability of discount seats on transatlantic segments; inventory control; reduced sales expense; marketing and reservations costs; and more effective equipment utilization. The applicants state that these coordinated activities among the Joint Applicants would, in the absence of antitrust immunity, expose them to antitrust risks.

12 Application at 5.

13 The alliance partners believe that competitive pressure in the marketplace is required to effect a change in existing restrictive aviation policies. They believe that approval of the Alliance Agreements coupled with antitrust immunity will promote economic and political incentives necessary to encourage restrictive aviation regimes to open their markets to the benefits of global service networks. The applicants affirm that the success of the Northwest-KLM alliance encouraged Austria, Belgium, and Switzerland to agree to the Open Skies accords and precipitated the Austrian, Delta, Sabena, and Swissair alliance. They believe that this alliance will promote further liberalization within the European marketplace.

policy of encouraging and facilitating the globalization and cross-networking of air transportation. The applicants believe that approval of the proposed Alliance Agreements coupled with antitrust immunity will "generate economic and competitive pressures that will create real marketplace incentives that are essential to foster and accelerate meaningful reform."[14]

The applicants hold the view that their requests are warranted by foreign policy considerations and are consistent with each of the Open Skies accords between the United States and Austria, Belgium, and Switzerland. The applicants assert that, while the various Open Skies accords do not necessarily provide for the grant of antitrust immunity, they do provide for "fair and expeditious consideration" of such applications.[15] The applicants contend that denial of the request for antitrust immunity could be viewed as contrary to the spirit and intent of the Open Skies Agreements with Austria, Belgium, and Switzerland. The applicants argue that denial of their request for antitrust immunity would be inconsistent with the U.S. Government's commitment to open skies and free and fair international competition and to what they assert is a Department assurance of "comparable opportunities" in exchange for open skies.

The applicants argue that the Alliance Agreements will not substantially reduce or eliminate competition between the United States and Europe. The applicants contend that almost all consequential transatlantic city-pair routes are or can be served by multiple U.S. and/or European airlines on either a nonstop, single-plane, or one-stop on-line connecting basis.[16] The joint applicants assert that the small size of each of the foreign partners' European hubs and homeland traffic bases impede their ability to compete for transatlantic traffic.

The applicants also assert that the alliance will not substantially reduce or eliminate competition on any route. They believe that the competitive effects of the alliance will be no different than the effects the Department found with respect to U.S.-Netherlands market when it approved the Northwest and KLM joint venture. Further, the applicants state that the Open Skies agreements between the U.S. and each foreign government will assure competitive

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14 Application at 7.

15 The Belgian and Austrian Memoranda of Consultations provide that the Department would give applications for antitrust immunity "...due consideration on a case-specific basis, taking into account U.S. law and international transportation policy at the time such a request is filed." The MOC's are dated March 1 and March 8, 1995, respectively.

16 With respect to U.S.-Europe traffic and seat capacity, Delta states that its share would increase less that 4%, and that its alliance partners are very small relative to the U.S.-Europe market. Austrian and Sabena each account for less than 1% both of the total U.S.-Europe passengers and seats and Swissair accounts for less than 3%. Delta states that its share of the U.S.-Europe market (about 13% share for passengers and seats) does not provide it the ability to dominate the market. The applicants argue that their combined market shares are not sufficient to enable the alliance to control the U.S.-Europe market, or permit it to introduce supra-competitive pricing or to reduce service below competitive levels. Furthermore, the applicants note that other transatlantic airlines will continue to have significant competitive advantages over the alliance carriers, since Delta has very limited ability to expand its beyond-Europe network because of various economic considerations and bilateral restrictions. Application at 27 and Exhibits 2 and 3.

discipline by providing for open entry and pricing and service freedom. Further, they state that there already exists an abundance of alternative competitive services in the affected markets.

Finally, the applicants state that the antitrust immunity requested in this proceeding should not affect their participation in IATA tariff coordination activities. They state that IATA has not impeded price competition in U.S.-Europe markets; that the Northwest-KLM alliance was not precluded from such participation; and that IATA participation is important to the determination of interline fares.

### B. Responsive Pleadings

On November 3, 1995, Tower Air, Inc. ("Tower") filed comments opposing the Joint Applicants' request for antitrust immunity for their combined operations. On November 13, 1995, American Airlines, Inc. (American); the International Air Transport Association (IATA); Trans World Airlines, Inc. (TWA); and United Air Lines, Inc. (United) filed answers to the applications.

#### 1. Tower

Tower views the grant of immunity to be highly anticompetitive, detrimental to the traveling public, and harmful to "smaller competing airlines." Tower maintains that immunizing the "Delta European" alliance will create a barrier to entry that low-cost carriers will not be able to overcome. Tower states that Delta already exercises control over four U.S. hubs and one European hub, and that immunity would allow Delta to control a total of four hubs on each side of the Atlantic. It is Tower's position that the resulting ability of Delta to accumulate and disperse traffic worldwide will foreclose the smaller carrier's ability to compete effectively with Delta and its partners.

Tower states that low-cost, new entrant carriers (like itself) have historically played an important role in the overall competitive scheme of airline operations. Tower maintains that these airlines have kept the large airlines "honest" and, therefore, have provided substantial public benefits. Tower asserts that low-cost airlines can only provide these varied public benefits if they are able to attract traffic to their services. Tower alleges that if an immunized "mega-carrier" controls traffic flow at several hubs, the ability of low-cost airlines to offer innovative pricing and service options to the traveling public will be severely diminished.

Tower maintains that immunity would enable Delta to eliminate competition, pool revenues, fix prices, and allocate markets with its alliance partners -- behavior traditionally prohibited under U.S. antitrust laws.[17] Tower believes that immunity would make Delta more dominant in the "foreign marketplace".[18] In short, Tower claims that the Joint Applicants' proposal offers

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17 Tower argues that each of these activities has long been held to be anticompetitive and adverse to free-market enterprise, not merely because of government oversight and regulation, but because they have demonstrably harmed consumers. Comments of Tower at 6.

18 Comments of Tower at 6.

numerous private benefits for Delta and its partners, but offers no demonstrable public benefits. Additionally, Tower states that approval of immunity will ensure that other so-called mega-carriers would file similar applications, further eroding the numerous public benefits associated with airline deregulation.

Tower maintains that this request is distinguishable from the Northwest-KLM application.[19] In this case, the Joint Applicants are all major transatlantic operators (Delta is the largest transatlantic airline), and Delta operates a significant level of service both to Eastern Europe or to points beyond its European gateway. In contrast, at the time it applied for immunity, Northwest was a "secondary" transatlantic operator on the verge of bankruptcy and KLM controlled only one European gateway (Amsterdam).

Finally, it is Tower's position that if the Department decides to grant the applicants' request for immunity, the Department should also (1) require that all immunized airlines enter into full interline agreements with all other airlines that wish them, and (2) grant antitrust immunity to all small airlines that compete with Delta.

**2. American**

American states that it has no objection to the Joint Applicants' request, provided that the American and Canadian Airlines International Ltd. joint application is also approved by the Department.[20] Notwithstanding, American believes that it is unlikely that a non-alliance airline would enter any of the ten overlapping city-pair markets served by the Delta alliance, since one or more of the four joint applicants have hub operations at one or both ends of each of these ten routes.

**3. IATA**

IATA requests that the Department withdraw from consideration in this case the issue of whether approval of the application should affect the Joint Applicants' continued participation in IATA tariff coordination. IATA believes that any action in this case to restrict the participation of alliance carriers in IATA tariff coordination activities would deny interline access to other carriers, would be unfair to IATA, its members, and their respective governments, and cannot be reconciled with the Department's obligation to engage in "orderly decision-making." IATA argues that this issue properly should be considered in Docket 46928.

**4. TWA**

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19 Tower believes that (1) the Department's actions in the Northwest Airlines, Inc. and KLM Royal Dutch Airlines antitrust immunity case were not beneficial for the public (*see* Orders 93-1-11 and 92-11-27), and (2) those actions by the Department should not be allowed to prohibit the application of antitrust laws to the rest of the airline industry.

20 OST-95-792, filed November 3, 1995.

TWA contends that the proposed immunized alliance would foreclose TWA's future market opportunities both to the alliance countries and beyond.[21] TWA also does not agree that the joint applicants' request is similar to the Northwest-KLM antitrust immunity case.[22] Further, TWA states that even if the Department were to treat the joint venture as a merger, the proposed Alliance Agreements would not pass a merger test because the applicants would not be allowed to merge under the Clayton Act.

TWA argues that the Alliance Agreements should be disapproved under any standard or methodology employed by the Department. TWA does not believe that the Department's antitrust analysis in the Northwest-KLM case is appropriate here, since the Joint Applicants state that they have no intention of operating as a single entity, but intend to retain their separate corporate and national identities. While TWA agrees that a single company can determine its own prices and capacity, TWA states that it does not follow from this that "four major transatlantic airlines who have no intention to merge can do the same."[23]

TWA maintains that the Alliance Agreements will substantially reduce competition between the United States and Austria, Belgium, and Switzerland. TWA argues that the alliance airlines compete head-to-head on ten nonstop transatlantic routes, and that they propose to engage in activities that are anticompetitive by any standard. TWA views the business practices envisioned by the Alliance Agreements to be in restraint of trade and contrary to law.

TWA believes that the public benefits claimed by the joint applicants can be achieved by reasonably available alternatives having materially less anticompetitive effect. TWA argues that numerous other code-share alliances, both domestic and international, have achieved the same benefits without immunity from the antitrust laws. TWA argues that the applicants have not sufficiently demonstrated that they cannot accomplish the same business coordination and integration while complying with U.S. antitrust laws.[24]

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21 TWA maintains that if it is to be an effective competitor, it needs an economically viable transatlantic system. Therefore, it must re-enter the transatlantic markets that it was compelled to leave because of its earlier financial difficulties, and that it must find ways to expand the scope of its service to compete with the developing alliances. TWA believes that the proposed alliance will have a "chilling" effect on its ability to compete. Comments of TWA at 3.

22 TWA asserts that the Northwest-KLM request is not comparable with the Joint Applicants' application, in that (1) the Northwest-KLM alliance had less market impact (at the time of the application, the carriers competed on only two routes), and (2) Northwest-KLM proposed to operate as a merged carrier. Further, TWA states that the U.S.-Netherlands Open Skies Agreement, unlike the U.S.-Austrian, Belgium and Switzerland Agreements, "made an implicit promise that antitrust immunity would be granted." Comments of TWA at 9. In this regard, TWA asserts that there can be no expectation by the foreign applicants' homeland governments that this request will receive antitrust immunity.

23 Comments of TWA at 12.

24 TWA believes that the Joint Applicants' desire for antitrust immunity primarily results from the likely diminution of significant competition in the affected city-pair markets, and not because of any benefits that may

TWA disagrees with the applicants' position that the existence of Open Skies agreements assures competitive pricing in the affected markets. TWA states that the existence of "an abstract legal right" does not validate the claim that entry into Austria, Belgium, or Switzerland is easy as a matter of fact.[25] TWA believes that while the affected markets are contestable, there are significant practical barriers to entry.[26]

TWA states that the agreements proposed by the applicants are "agreements to agree," and, as such, they do not justify grant of immunity for the underlying activities that the joint applicants would agree upon at a later date. Therefore, TWA urges the Department to grant "discussion immunity,"[27] and to require the applicants to submit their actual operating agreements for public comment and review. Finally, TWA states that the applicants' claims of public benefit are either "unsubstantiated assertions, illogical, or both," and urges the Department to conduct a public hearing on this matter."

### 5. United

While stating that the Department should continue to encourage and promote the expansion of global alliances whenever it would further the Department's consumer and competition objectives, United expresses no view regarding the Joint Applicants' requests.

United understands that airlines are attempting to structure their international operations as networks following the U.S. domestic hub-and-spoke model. United recognizes that passengers prefer a "seamless," on-line transportation product, and that the carrier (or carrier alliance) that can best provide passengers the benefits of on-line, seamless service on a global basis will be in the best position to compete successfully.[28]

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be provided to the traveling public in the form of enhanced service over the alliances-connecting hubs. Comments of TWA at 14-16.

25 Comments of TWA at 24.

26 According to TWA, Austrian, Sabena, and Swissair exercise control over travel agents both through their Computer Reservation System (CRS) dominance, and through commissions and override payments. Comments of TWA at 25-26. TWA notes that in Switzerland, Swissair controls the national marketing company for Galileo, and its CRS, which has an 80% market share; and in Austria, the market structure is similar to that existing in Switzerland with Galileo, in which Austrian has an ownership interest. Further, TWA argues that the alliance partners will dominate on-line connections through each Delta hub and each of the European partners hubs. For a competing airline to capture sufficient on-line and beyond traffic, TWA argues that the new entrant would have to establish a connecting hub at the European gateway. TWA views this as an impossible prospect.

27 Comments of TWA at 29.

28 United views the use of mergers and acquisitions as limited, with essential route rights frequently unavailable, and with the investment costs associated with the development of a hub system in a foreign country, as often prohibitively high. Therefore, United believes that carriers have turned to global alliances and code sharing as the most efficient ways to develop a global network.

In United's view, antitrust immunity plays an important role in furthering the establishment of global networks. United notes that the prospect of antitrust immunity can also aid the United States in securing open skies bilateral agreements with many of its major trading partners. Also, United believes that antitrust immunity can have a direct bearing on alliance partners' ability to maximize the efficiency gains available from the alliance, and that a selective policy of granting such immunity would distort competition among the various alliances that now exist or that may be agreed to in the future.

### 6. Joint Applicants

On November 20, 1995, the Joint Applicants filed a reply. The applicants maintain that TWA and Tower have failed to establish any basis for disapproval of the Alliance Agreements or for denial of the request for antitrust immunity. They believe the proposed Alliance is fully consistent with Department policy, meets all applicable legal standards, is supported by foreign policy considerations, and will produce important public benefits and substantially increase transatlantic competition.

The Joint Applicants contend that TWA has been a long-standing opponent of code-sharing, cooperative marketing arrangements, and other global alliances. They argue that TWA has no service to the foreign applicants' homelands, and TWA offers no indication if or when it plans ever to serve the three countries.[29] They maintain that TWA's arguments have no basis in law, fact, or policy, and should be rejected.

Contrary to TWA's claim, the applicants assert that the Clayton Act standard applies because the Joint Applicants have made it clear that they seek the flexibility to engage in single-firm route planning, sales, and marketing activities as if the transaction were a merger. Further, the applicants note that U.S. law, limitations imposed in bilateral aviation agreements, and foreign laws on foreign investment all preclude the joint applicants from using an actual corporate merger to achieve a global alliance. The applicants assert that their application stands on a similar legal footing with Northwest-KLM, requiring the application of the Department's Clayton Act legal standard.

The applicants reject TWA's argument that the Alliance Agreements would substantially reduce competition between the U.S. and Austria, Belgium, and Switzerland and in certain city-pair markets,[30] stating that the availability of alternative services over other U.S. or

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29 In any event, the applicants insist that TWA's concerns are both unsubstantiated and without merit. They argue that TWA's ability to serve the three European countries has never been foreclosed and is now assured by the Open Skies agreements concluded with the foreign applicants' homeland governments. Further, they insist that TWA has failed to demonstrate how the proposed Alliance would impair TWA's ability to serve the three European countries or any other European market.

30 The applicants argue that TWA does not dispute that the Alliance Agreements would not substantially reduce competition in the overall U.S.-Europe market. Reply of Joint Applicants at 7.

European gateways will effectively discipline the Alliance carriers' competitive behavior. The applicants also believe that TWA's position in this matter is inconsistent with the Department's policy of enhancing intergateway competition through the creation of global hub-and-spoke networks.[31] The applicants argue that the linkage of these U.S.-Europe hubs will serve to enhance transatlantic competition, by allowing joint venture airlines to compete more effectively against rival alliances as a unified, more efficient enterprise. Furthermore, the applicants point out that, just as there are viable competitive alternatives to the Northwest-KLM alliance, there are numerous viable competitive alternatives offered by U.S. and foreign carriers in the various affected country-pairs and city-pairs to ensure competitive discipline regarding fares and service.[32]

The applicants also reject TWA's claim that antitrust immunity is not a necessary component for realization of the Alliance's proposed objectives.[33] The applicants restate that absent immunity there is no assurance that a third party would not challenge the Alliance on antitrust grounds. Thus, the applicants contend that the threat of challenge would make it impossible for the Alliance airlines to proceed with the proposed joint venture.

The applicants dispute the TWA assertion that the Northwest-KLM case is distinguishable and is not precedential. They believe that the fundamental issue is that their alliance will not substantially reduce competition, either in the U.S.-Europe market or in the U.S.-country-pair/city-pair markets. Also, they state that the Alliance Agreements are virtually identical to the Northwest-KLM Agreements; that the differences are not significant; and that their objectives are similar. Finally, while the applicants do not believe that pre-existing ownership is a decisionally relevant factor, they note that there is cross-ownership among the Joint Applicants. (*see* Section I.C. *supra*.).

The applicants contend that, contrary to TWA's assertion, foreign policy considerations support approval of their requests. They suggest that the Open Skies accords between the United States and the three European countries are fundamentally the same as the aviation accord between the United States and the Netherlands, and that the foreign "expectations" are similar. The applicants contend that the Austrian and Belgian M.O.C.'s expressly recognized the importance

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31 The applicants note that the Department's U.S. International Air Transportation Policy Statement recognizes that a successful international hub-and-spoke system requires hubs in both the United States and Europe. Reply of Joint Applicant at 9.

32 The applicants also maintain that they do not control their home-country travel agents and would not do so after an Alliance approval by the Department. They emphasize that the objective of this venture is to enable the four airlines to become more, not less, competitive in the U.S.-Europe marketplace. They insist that antitrust immunity will apply only to activities among the Alliance partners; the Alliance itself will continue to be constrained by applicable laws, including the antitrust laws.

33 These benefits stated by the applicants include (a) increased gateway-to-gateway and behind-gateway on-line services; (b) expanded market access; (c) coordinated hubs and coordinated transatlantic segments; (d) enhance utilization of aircraft and seat inventory which would result in the ability to offer more discount fares and seats; and (e) reduced sales, marketing and reservations costs.

placed by these governments on the direct relationship between open skies and the need for antitrust immunity.[34] Finally, the applicants ask the Department to reject TWA's request for a formal oral evidentiary hearing.

The applicants contend that Tower's concern that the alliance will create barriers for new entrants is incorrect. They concede that Tower is a successful low-cost, low-price, point-to-point carrier in both the domestic U.S. and international markets.[35] They reject the notion that Delta is able to control all traffic moving over its hubs, because Delta's services are disciplined by intense intergateway competition. They claim that, just as there is intense competition domestically, there is and will be equally intense competition between the United States and Europe. The applicants ask the Department to reject Tower's demand for "most favored nation" interline agreements, noting that the concept is contrary to Department policy that allows carriers, not governments, to determine methods of operation. Finally, the applicants argue that Tower's opposition, based on its fear that approval of the joint application will spawn similar transactions, has no merit. They state that if the Alliance encourages restrictive governments to liberalize their aviation regimes, competition and opportunities for U.S. carriers, including Tower, will increase.

## IV. Tentative Decision

We tentatively find that the Alliance Agreements should be approved and granted antitrust immunity under sections 41308 and 41309, to the extent provided below. Upon examination of the Joint Applicants' proposal, we tentatively find that the integration of the four carriers' services will, on balance, enhance competition in transatlantic markets and allow the airlines to provide better service and enable them to operate more efficiently. We also tentatively find that it is unlikely that the Alliance Agreements -- subject to the conditions included here -- will substantially reduce competition in any relevant market.

As an initial matter, the Department has already determined that competitive market forces, not government intervention, should drive business decisions such as interline practices.[36] Moreover, we have found it appropriate to continue consideration of these applications on a case-by-case basis.

We note that the Department of Justice has raised with the Joint Applicants concerns regarding the effect of antitrust immunity in several specific city-pair markets. In three such markets -- Atlanta-Brussels, Atlanta-Zurich, and Cincinnati-Zurich -- DOJ's concern about the effect of

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[34] The applicants further maintain that disapproval of the Alliance Agreements or the withholding of antitrust immunity will contravene the "spirit" and "intent" of the Open Skies accords, and be inconsistent with the Department's express undertaking to provide "comparable opportunities" in exchange for open skies agreements.

[35] They note that Tower serves the New York-Amsterdam market despite the immunized Northwest-KLM alliance, with its European base in Amsterdam.

[36] Order 85-12-69 at 6.

immunity on the availability of competitive options for time-sensitive (usually business) travelers led the applicants to agree to the withholding approval of and granting antitrust immunity for joint activities involving certain specific fare categories. The Joint Applicants and the Department of Justice have agreed to these conditions (attached as Appendix A), and we adopt them. In doing so, however, we note that the terms of these conditions are not necessarily determinative of our tentative decision to grant the application. We intend to review this matter in 18 months.

We have tentatively decided to approve and grant immunity with respect to the three hub-to-hub markets -- Atlanta-Brussels, Atlanta-Zurich, and Cincinnati-Zurich -- for certain categories of fares that include restrictions requiring a minimum stay of at least seven days or that require a Saturday night stay as a condition of the fare.

In four city-pairs -- all from New York -- we recognize that granting antitrust immunity to the alliance would eliminate existing "blocked-space" competition between or among the alliance members for nonstop travel, and that DOJ has concerns in this regard, although significant existing competition would remain in the two largest of these city-pairs, New York-Brussels and New York-Zurich. We believe that, in these markets, there is sufficient potential market response (particularly new entry in response to any supra-competitive price increases) to mitigate any anti-competitive effects. We also tentatively believe that some competitive discipline can be afforded by one-stop and connecting services on these New York routes.

We recognize that there are legitimate concerns regarding future potential competition in these New York markets, particularly the New York-Geneva and New York-Vienna markets which will have no competing non-stop service. However while it is a close issue, we conclude, on balance, that existing competition and the prospects for new entry in these non-hub, New York markets, together with the anticipated consumer benefits and efficiencies, and considerations of international transportation policy regarding open skies markets, justify extending our grant of immunity to these markets. We emphasize that, in cooperation with the Department of Justice, we will closely monitor the competitive environment in each of these markets during the next 18 months, to review whether immunity continues to be appropriate and in the best interests of consumers. This will allow us to determine if, as the applicants contend, they will operate to the benefit of consumers and competition.

We tentatively find that our approval and grant of antitrust immunity for the proposed Agreements will allow the joint applicants to maximize most of the various pro-competitive and pro-consumer benefits associated with integrated alliances that we foresaw resulting from the fundamental liberalization of air services fostered by an open aviation accord. In addition, we tentatively find that we should require the applicants (1) as a condition to withdraw from all International Air Transport Association (IATA) tariff coordination activities relating to through prices between the United States and Austria, Belgium, or Switzerland, as well as between the United States and the homeland(s) of foreign carriers participating with U.S. carriers in other immunized alliances; (2) to file all subsidiary and subsequent agreement(s) with the Department for prior approval; and (3) to resubmit for renewal their variously styled alliance agreement(s) in five years. We also find it in the public interest to direct Austrian, Sabena, and

Swissair to report full-itinerary O&D Survey data for all passenger itineraries that contain a United States point (similar to the O&D Survey data already reported by Delta).

## A. Decisional Standards under 49 U.S.C. Sections 41308 and 41309

### 1. Section 41308

Under 49 U.S.C. Section 41308, the Department has the discretion to exempt a person affected by an agreement under Section 41309 from the operations of the antitrust laws "to the extent necessary to allow the person to proceed with the transaction," provided that the Department determines that the exemption is required in the public interest. It is not our policy to confer antitrust immunity simply on the grounds that an agreement does not violate the antitrust laws. We are willing to make exceptions, however, and thus grant immunity if the parties to such an agreement would not otherwise go forward without it, and we find that grant of antitrust immunity is required by the public interest.

### 2. Section 41309

Under 49 U.S.C. section 41309, the Department must determine, among other things, that an inter-carrier agreement is not adverse to the public interest and not in violation of the statute before granting approval.[37] The Department may not approve an inter-carrier agreement that *substantially* reduces or eliminates competition unless the agreement is necessary to meet a serious transportation need or to achieve important public benefits that cannot be met or that cannot be achieved by reasonably available alternatives that are materially less anticompetitive.[38] The public benefits include international comity and foreign policy considerations.[39]

The party opposing the agreement or request has the burden of proving that it substantially reduces or eliminates competition and that less anticompetitive alternatives are available.[40] On the other hand, the party defending the agreement or request has the burden of proving the transportation need or public benefits.[41]

## B. Antitrust Issues

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37 Section 41309(b).

38 Section 41309(b)(1)(A) and (B).

39 Section 41309(b)(1)(A).

40 Section 41309(c)(2).

41 *Id.*

The joint applicants state that the Alliance Agreements are intended to create legal frameworks which, subject to negotiation and execution of definitive operating agreements consistent with those frameworks, will allow Delta, Austrian, Sabena, and Swissair, while retaining their separate corporate and national identities, to cooperate to the extent necessary to create a seamless air transport system. The Alliance Agreements' intended effects accordingly are equivalent to a merger of the four carriers.[42] In determining whether the proposed transaction would violate the antitrust laws, we apply the Clayton Act test used in examining whether mergers will substantially reduce competition in any relevant market.[43]

The Clayton Act test requires the Department to consider whether the Agreement will substantially reduce competition by eliminating actual or potential competition between Delta, Austrian, Sabena, and Swissair so that they would be able to effect supra-competitive pricing or reduce service below competitive levels.[44] To determine whether a merger or comparable transaction is likely to violate the Clayton Act, the Justice Department and the Federal Trade Commission use their published merger guidelines.[45] The Merger Guidelines' general approach is that transactions should be blocked if they are likely to create or enhance market power, market power being defined as the ability profitably to maintain prices above competitive levels for a significant period of time (firms with market power can also harm customers by reducing product and service quality below competitive levels). To determine whether a proposed merger is likely to create or enhance market power, the Department of Justice and the FTC primarily consider whether the merger would significantly increase concentration in the relevant markets, whether the merger raises concern about potential competitive effects in light of concentration in the market and other factors, and whether entry into the market would be timely, likely, and sufficient either to deter or to counteract a proposed merger's potential for harm.

### 1. Global Competition

The traditional analysis for airline mergers has focused on discrete city-pair routes. Without minimizing the significance of city-pair analysis, however, we believe it is also important to recognize that the rapid growth and development of global airline alliance networks requires an additional perspective on competitive impact -- the perspective of a worldwide aviation market in which travelers have multiple competing options for reaching destinations over multiple intermediate points. The pro-competitive effects of global alliances can be particularly evident

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42 TWA believes that it would be inappropriate to consider the proposed alliance under the standards applicable to mergers because the applicants have no intention of merging. However, it is clear from the record of this case that the joint applicants fully intend to integrate their joint operations to the fullest extent permissible under U.S. law. Therefore, we find it appropriate to base our public interest evaluation on the standard Clayton Act merger test.

43 Order 92-11-27 at 13.

44 *Id.*

45 57 Fed. Reg. 41552 (September 10, 1992).

in the case of the behind- and beyond-gateway markets where integrated alliances with coordinated connections, marketing, and services, can offer competition well beyond mere interlining.[46] The competitive effect is evident, though perhaps less dramatic, in the case of services between interior U.S. cities and foreign gateways, or between U.S. gateways and interior foreign cities. Integrated alliances can, in short, offer a multitude of new on-line services to thousands of city-pair markets, on a global basis. Thus, a significant element in antitrust analysis is the extent to which facilitating airline integration (through antitrust immunity or otherwise) can enhance overall competitive conditions.

Our analysis indicates that the alliance for which antitrust immunity is sought here will have a substantial pro-competitive impact, bringing on-line service to nearly 32,000 city-pair markets with an estimated total traffic of 21.4 million passengers. In particular, the alliance will significantly increase competition and service opportunities to many of the 6.1 million passengers in behind- and beyond- gateway markets.[47] This analysis further supports the view that these alliances will benefit consumers by increasing international service options and enhancing competition between airlines, particularly for traffic to or from cities behind major gateways. By stimulating traffic, the increased competition and service options will expand the overall international market and increase overall opportunities for the traveling public and the aviation industry. U.S. consumers and airlines should be major beneficiaries of this expansion and of the associated increase in service opportunities.

With this perspective, we address below the issue of airline competition at the city-pair market level. In doing so, we note that concentration figures are not conclusive. Individual airline nonstop city-pair markets usually have high levels of concentration, since most nonstop markets are served by only a few airlines. A key consideration for determining whether the Delta-Austrian-Sabena-Swissair alliance (or any other airline merger or joint venture) is likely to reduce competition is potential competition, *i.e.,* whether other airlines can enter the relevant markets in response to inadequate service or supra-competitive prices. The Open Skies agreements with Austria, Belgium, and Switzerland eliminate all governmental restrictions on entry into U.S.- Austria, Belgium, and Switzerland markets for U.S. airlines and the airlines of these three countries. The agreements accordingly eliminate perhaps the most significant remaining barriers to entry in those markets. As a result, the relevant considerations here are whether other factors will prevent U.S. and foreign airlines from entering the U.S.-Austria,

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46 *See* Joint Application of United and Lufthansa, Order 96-5-12, served May 9, 1996, at 17-18.

47 Our analysis is based on Origin-Destination Survey of Airline Passenger Traffic for the twelve months ended September 1995, adjusted to account for traffic carried by non-reporting foreign airlines. Our decision here is based in part on statistics extracted from restricted international O&D Survey Data and international T-100 and T-100(f) data reported to the Department. We have determined that the public interest warrants our use of and limited disclosure of such data in this proceeding, because the public interest in evaluating this application on the basis of this data clearly outweighs any possible competitive disadvantage U.S. carriers might face from release of the data to foreign carriers. This determination is consistent with (1) the requirements set forth in sections 19-6(b) and 19-7(e) of 14 CFR Part 241 as they pertain to international T-100/T-100(f) data and O&D data, respectively, and (2) the Department's policy statement set forth in 14 CFR section 399.100, which provides that the Department may disclose restricted O&D data consistent with its regulatory functions and responsibilities.

Belgium, and Switzerland markets, should the applicants increase fares above, or lower service below, competitive levels.

Finally, as a general rule, airlines like other firms may engage in joint ventures and cooperative arrangements without violating the antitrust laws. The courts and the enforcement agencies have usually found that such arrangements are likely to promote economic efficiency and further competition.[48] As discussed above, that has been our experience with the Northwest-KLM alliance -- the integration of those partners' operations has increased the efficiency of their operations and made it possible for the two carriers to offer better service.

The Joint Applicants primarily compete in transatlantic markets. The current code-share arrangements between the Joint Applicants involve twelve gateway-to-gateway nonstop transatlantic routes, a single one-stop transatlantic route, and certain other international routes. Although the applicants coordinate on a service and marketing basis, the airlines price their seats independently in competition with each other, to maximize their own revenue over these routes. Therefore, Delta and the three foreign carriers engage in some price competition over their blocked-space routes.

### 2. The Department of Justice's Examination of the Alliance

The joint application submitted by Delta, Austrian, Sabena, and Swissair for antitrust immunity necessarily requires us to examine the alliance's potential impact on competition in all relevant markets. On such antitrust issues, we initially confer with the Department of Justice, given its experience and responsibility the enforcement of the antitrust laws. However, we have the ultimate authority to determine whether the application meets the statutory prerequisites for the grant of antitrust immunity.

The Department of Justice has examined the likely competitive impact of the proposed alliance between Delta, Austrian, Sabena, and Swissair. That Department identified seven nonstop markets -- Atlanta-Brussels, Atlanta-Zurich, Cincinnati-Zurich, New York-Brussels, New York-Geneva, New York-Vienna, and New York-Zurich -- which in its view raise serious concerns because competition could be reduced if Delta, Austrian, Sabena, and Swissair were able to agree on fares and capacity for local traffic.

By letter dated May 20, 1996, Mr. Joel I. Klein, Principal Deputy Assistant Attorney General, of the Department of Justice Antitrust Division, transmitted the agreement reached between the Department of Justice and the Joint Applicants. See Appendix B.

After extensive discussions between the Department of Justice and the applicants, the applicants have agreed to limit the scope of their requested immunity so as to exclude certain

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48 *See, e.g.*, Northwest Wholesale Stationers v. Pacific Stationery & Printing Co., 472 U.S. 284, 295 (1985).

activities relating to particular fares and capacity for U.S. point of sale local passengers on three routes: Atlanta-Brussels, Atlanta-Zurich, and Cincinnati-Zurich.

The conditions proposed by the Department of Justice are attached to this order (Appendix A). Except for Appendix A's exclusion of immunity for the four New York markets, the Joint Applicants have agreed to these conditions. In brief, the agreed conditions would exclude from the grant of immunity the following activities: pricing, inventory, or yield management coordination, or pooling of revenues, with respect to local U.S. point-of-sale passengers flying nonstop in these three markets, with certain exceptions. The exceptions that would be covered by antitrust immunity would be the promotion and sale of certain discounted fare products: corporate fares, promotional fares, and published fares requiring either a Saturday night stay or a minimum stay of seven days or more. These exceptions are subject to limitations designed to preserve competition for local passengers. For example, coordination on certain kinds of promotional fare products would be immunized only if they are offered in at least twenty-five other city-pair markets. The applicants could also coordinate on such matters as the number of flights and aircraft types used in these markets.

The agreement gives Delta, Austrian, Sabena, and Swissair the right at any time within eighteen months to ask us to reexamine the need to exclude certain local traffic in the three hub-to-hub markets from the grant of antitrust immunity, in light of such factors as current competitive conditions and the potential efficiencies achievable from a further integration of the operations of the applicants in the three nonstop markets. In any event, we will reexamine the excluded activities related to particular fares and capacity in the three markets on our own motion in 18 months.

The applicants have adopted these limitations on the requested immunity after conferring with the Department of Justice, and we tentatively intend to include the agreed conditions in our proposed grant of antitrust immunity. The antitrust analysis set forth in this order therefore assumes that the immunity will exclude local traffic in the three markets to the extent set forth in Appendix A.

Mr. Klein, in his May 20, 1996, letter advised us that DOJ and the Joint Applicants could not agree on an exception for the four New York routes: New York-Brussels, New York-Geneva, New York-Vienna, and New York-Zurich, and that DOJ has concluded that "...a carve-out of the New York city-pairs is necessary to preserve competition in these markets." DOJ requests that the terms and conditions applicable to the three Atlanta and Cincinnati markets apply to the four New York markets as well.

With respect to the four New York-Europe markets -- New York-Brussels, New York-Geneva, New York-Vienna, and New York-Zurich -- the DOJ has indicated strong reservations. We have carefully considered and appreciate these concerns. Nonetheless, we also consider the open-entry nature of the markets in an open-skies regime, our own view of the likelihood of potential entry from New York and the competitive discipline afforded by existing competition from one-stop and connecting services. In addition, we consider in the balance important strategic U.S. objectives in international transportation policy regarding the promotion of

aviation liberalization. Based on these considerations, we have tentatively determined to include antitrust immunity for the New York-Brussels, New York-Geneva, New York-Vienna, and New York-Zurich markets. However, we will review this determination regarding the New York markets, in cooperation with DOJ in 18 months, in light of actual developments in these markets.

### 3. Particular Markets

In addition to considerations of global airline network competition, there are three relevant markets requiring a competitive analysis: first, the U.S.-Europe market; second, the U.S.-Austria, Belgium, and Switzerland markets; and third, the Atlanta-Brussels, Atlanta-Zurich; Cincinnati-Zurich; and the New York-Brussels, Geneva, Vienna, and Zurich markets.[49]

#### (a) The U.S.-Europe Market

We have tentatively determined that the Alliance Agreements should not diminish competition in the U.S.-Europe marketplace. The record indicates that Delta is the largest U.S.-flag carrier in the U.S.-Europe market, and the second-largest overall (after British Airways). During the 12 months ended June 1995, Delta's U.S.-Europe nonstop passenger market share was 12.5%. The proposed enhanced alliance share (including Austrian, 0.6%; Sabena, 0.8%; and Swissair, 2.8%) was 16.7%. In contrast, the British Airways and USAir code-share alliance had a 15.6% passenger market share; the United Air Lines and Lufthansa code-share alliance had a 14.9% passenger market share; and the Northwest Airlines and KLM Royal Dutch Airlines alliance had a 9.2% passenger market share.[50] The U.S.-Europe marketplace is thus highly competitive in terms of service.

In addition, as the applicants note, other carriers in the market will continue to have significant competitive advantages over the joint applicants. Delta's authority to serve London is much more limited than that held by British Airways, United, and American, and Delta has no authority to serve London-Heathrow with its own aircraft. The U.S.-London market is the largest U.S.-Europe market, and London has more intra-Europe service than any other European city. Additionally, Delta's foreign partners operate from smaller homelands and hubs than those of other major European airlines.

#### (b) The U.S.- Austria, Belgium, and Switzerland Markets

In these country-pair markets, Delta and its foreign partners will have the largest market share. Nonetheless, based on our evaluation, we do not find that the proposed integration will enable

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49 We find it appropriate to focus our analysis on these seven local, nonstop, hub-to-hub markets. Since the alliance partners' would have hubs at each end of these markets, thus affording a degree of potential market power over service and pricing.

50 Additionally, American Airlines had a 11.3% passenger market share.

the joint applicants to charge supra-competitive prices or to reduce service below competitive levels.

Even if a merger creates a partnership with a preponderant market share, the merger would not substantially reduce competition if competitors have free and open access to the marketplace. This is precisely the type of market envisioned and promoted by the U.S.-Austria, Belgium, and Switzerland Open Skies accords. Despite the large market share held by Delta's foreign partners in their respective homeland markets, we see no barriers to entry by other U.S. airlines in the Austria, Belgium or Switzerland markets, as discussed below Two U.S. airlines besides Delta are currently serving Belgium. American Airlines operates nonstop flights to Brussels from Chicago and New York. Also, United Air Lines operates a nonstop flight to Brussels from Washington (Dulles). In addition, two U.S. airlines besides Delta are currently serving Switzerland: American Airlines operates nonstop flights to Zurich from Chicago and New York. In addition, United Air Lines operates nonstop between Zurich and Washington (Dulles).

The U.S.-Austria, Belgium, and Switzerland Open Skies accords provide that any U.S. airline may serve each of these countries from any point in the United States. Despite the arguments of TWA and Tower, we are not persuaded that there are other significant barriers that will prevent entry into these markets. TWA primarily cites as alleged barriers to entry the large CRS market shares held in Switzerland and Austria by the CRS affiliated with Swissair and Austrian, and the alleged ability of Swissair and Austrian to use travel agency override commissions to deny independent U.S. airlines an opportunity to obtain travel agency bookings in the home countries of those two airlines. Even if Swissair and Austrian have substantial competitive advantages in obtaining European-originating traffic for the services operated by the alliance, TWA has its own advantage, in its access to behind-gateway traffic in the U.S. More importantly, Swissair's and Austrian's alleged advantages would be possessed by any major European airline, yet those competitive strengths have not deterred other U.S. airlines from entering many European markets. As we noted in our tentative approval of the United-Lufthansa alliance, for example, several U.S. airlines have entered--or will soon enter--U.S.-Germany markets in competition with United and Lufthansa.[51] We see no reason why U.S. airlines could not begin new service to Austria, Belgium, and Switzerland if the applicants charge supra-competitive fares or lower service below competitive levels.

While TWA also suggests that slots may be difficult to obtain at some of the applicants' European gateways, TWA has not alleged that slots would actually be unavailable to a U.S. airline that wanted to begin serving one of those cities in competition with the applicants.

Finally, we are unpersuaded by the TWA and Tower complaints that our approval and immunity of the Northwest-KLM alliance cannot support the approval and immunity of the Delta alliance because the Delta alliance is much bigger. While the Delta alliance will have a larger share of the transatlantic traffic than the Northwest-KLM alliance, we do not believe that

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51 Orders 95-5-12, at 23 n. 49.

its size will preclude other airlines from entering the transatlantic markets served by the applicants.

### (c) The City-Pair Markets

A third relevant class of market requiring a competitive analysis is the city-pair. As we indicated earlier, there are seven local, nonstop, hub-to-hub markets that raise competitive concerns; specifically, regarding the alliance partners' (1) hub strength at each end of these markets, and (2) joint ability to set prices and capacity that would reduce or eliminate competition. Currently, Delta and its foreign partners provide code-share operations in ten nonstop markets (five to Switzerland, four to Belgium, and one to Austria) and two one-stop markets.[52] Of these, the alliance partners provide nonstop, service in seven markets: Atlanta-Brussels and Zurich; Cincinnati-Zurich; and New York-Brussels, Geneva, Vienna, and Zurich.[53]

#### (1) New York-Europe Markets

We recognize DOJ's concern regarding the potential loss of competition in certain New York markets in which the alliance partners now compete under a blocked-space arrangement. We are mindful of the concerns with respect to any diminution of the number of competitive players in any market or submarket. In the two largest of these markets (New York-Brussels and New York-Zurich), there will remain a significant competitor to the alliance for non-stop travel, and in all four markets there will remain a number of competitive one-stop and connecting services. For these and other reasons discussed below, we have tentatively determined to grant the antitrust immunity for these markets, while affirming that we intend to examine carefully the actual operation of the markets, together with DOJ, in 18 months. At the same time, we believe that the potential for new entry in the New York markets, combined with actual competition, mitigates these concerns sufficiently for us to approve antitrust immunity for these markets, subject to our 18-month review.

In reaching this tentative conclusion, we tentatively believe that the loss of competition in the four New York-Europe markets should not result in serious competitive harm to passengers for several reasons.

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52 While the joint applicants do not operate separate aircraft in these markets, they do continue to engage in price competition under various blocked-space agreements. The Alliance Agreements would end this price competition.

53 As to the three remaining nonstop markets: (1) in the Chicago-Brussels market, American Airlines provides competing nonstop service; (2) in the Boston-Brussels market, United Air Lines via Washington (Dulles), Northwest Airlines via Amsterdam, USAir via Frankfurt, and British Airways via London (Heathrow) provide competing connecting services; and (3) in the Washington-Geneva market, Northwest Airlines/KLM via Amsterdam, Lufthansa via Frankfurt, British Airways via London (Heathrow), and Air France via Paris provide competing connecting services.

First, the New York metropolitan area is the largest Origin and Destination traffic generating point in the United States-Europe market. Consequently, the New York markets are most attractive to new carrier entry in the event of supra-competitive fare levels, even without access to large domestic feed traffic.[54]

Second, potential new entry in the New York market would not be required to overcome a Delta-dominated hub. For the twelve months ended June 1995, in the New York-Europe market, Delta and its foreign partners operated about 19 percent of the departures from New York, and carried about 17 percent of the passengers from New York, less than the market share normally considered necessary to achieve hub "dominance". By comparison, American Airlines operated about 11 percent of total departures, and carried about 8 percent of the passengers; TWA operated about 9 percent of total departures, and carried about 10 percent of the passengers; and British Airways share of the market was about 11 percent for both departures and traffic.

Third, Delta does not "dominate" the share of U.S. domestic traffic coming to New York's JFK, and other carriers with such feed could pose a competitive threat. As of February 1996, Delta operated 11 percent of domestic departures and 18 percent of domestic seats. In comparison, American Airlines operated 20 percent of domestic departures and 25 percent of domestic seats, and TWA operated 22 percent of domestic departures and 34 percent of domestic seats at JFK.

As noted earlier, we fully intend to work closely with the Justice Department to monitor the behavior of these markets and to conduct a careful review of them during the 18 months of our final order in this docket.

**(2) Other Europe Markets**

The Atlanta-Brussels, Atlanta-Zurich, and Cincinnati-Zurich markets do raise some competitive concern. Delta is the hub-dominant airline in both Atlanta and Cincinnati, and the Joint Applicants may therefore have some power over prices and capacity in these three markets. For the twelve months ended June 1995, in the Atlanta-Europe market, Delta and its foreign partners' operated about 84 percent of the total departures from Atlanta, and carried about 85 percent of the passengers from Atlanta. In Cincinnati, Delta provided 100 percent of total departures and traffic. Therefore, as the applicants have agreed with the Justice Department, we tentatively accept the applicants' agreement with DOJ to exclude certain local traffic in the three relevant hub-to-hub markets for time-sensitive passengers traveling on certain

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54 We disagree with Tower's assertion that small, low-cost carriers will suffer a competitive disadvantage if we grant antitrust immunity to the joint applicants. Tower's own service record belies this point. In spite of the Northwest-KLM alliance, both Tower and Uzbekistan Airways serve the New York-Amsterdam market. *See* Official Airline Guide, Worldwide Ed., March 1996.

"unrestricted fares" (*i.e.*, published fares not requiring either a Saturday night stay or a minimum stay of seven days or more). These latter are more typically used by the bulk of passengers whose greater flexibility in time of travel permits them readily to take advantage of numerous competing one-stop and connecting fares on other carriers.

In finding that certain aspects of these three nonstop markets should be excluded from the grant of antitrust immunity, the Justice Department appears to have a general concern that other airlines may be relatively unlikely to provide nonstop service on these routes, since the applicants have the competitive advantage of hubs at both ends of each route. The Justice Department appears to reason that, for certain especially time-sensitive business travelers, connecting services do not adequately discipline the fares and service offered by nonstop carriers. Leisure travelers, in contrast, are usually quite willing to take connecting services in order to obtain lower fares. Without addressing here the DOJ views, we note simply that the applicants' agreement with the Justice Department eliminates this issue regarding competition in three of the nonstop markets. Moreover, there are no barriers to entry in any of the relevant markets, and no party has argued to the contrary.

### (d) The Behind- and Beyond-Gateway Markets[55]

As we have noted, the pro-competitive effects of global alliances can be particularly evident in the case of the behind- and beyond-gateway markets, where many passengers now lack convenient on-line service, and where integrated alliances with coordinated connections, marketing, and services, can, therefore, offer competition well beyond traditional interlining. For example, our analysis estimates that the proposed alliance will result in enhanced on-line connecting opportunities in nearly 32,000 city-pair markets from 207 U.S. cities to 154 cities in Europe and beyond. The behind- and beyond-gateway markets accounted for an estimated 6.3 million passengers during the 12 months ended June 1995, nearly 30 percent of the 21.4 million passengers we estimate will have access to the Delta/Austrian/Sabena/Swissair integrated network. Accordingly, we conclude that the proposed alliance will significantly increase competition in the behind- and beyond-gateway markets.

We tentatively find that the Alliance Agreements will substantially benefit competition, since they will enable the joint applicants to operate more efficiently and to provide the public with a wider variety of on-line services. We anticipate that the pro-competitive advantages that will be provided through an integration of the four carriers' services will outweigh any potential loss of competition in the markets now served under the blocked-space agreements. We therefore believe that the proposed Alliance Agreements will not cause a substantial reduction or elimination of competition.

## C. Public Interest Issues

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55 Our analysis is based on Origin-Destination Survey of Airline Passenger Traffic for the twelve months ended June 1995, adjusted to account for traffic carried by non-reporting foreign airlines.

Under section 41309 we must determine whether the Alliance Agreements would be adverse to the public interest. A similar public interest examination is required by section 41308. Except as noted, we tentatively find that approval of the Alliance Agreements will promote the public interest.

Open Skies agreements with foreign countries give any authorized carrier from either country the ability to serve any route between the two countries (and open intermediate and beyond rights) it wishes. These agreements place no limits on the number of flights that can be operated, and carriers can charge any fare unless it is disapproved by both countries.[56]

We have found that the Alliance Agreements are likely to benefit the traveling public in numerous markets and are unlikely to reduce competition significantly in most markets.

As enunciated in our April 1995 U.S. International Air Transportation Policy Statement, airlines around the world are forming alliances and linking their systems to become partners in transnational networks to capture the operating efficiencies of larger networks, and to permit improved service to a wider array of city-pair markets. We are already seeing the benefits of these international alliances, and we have undertaken to facilitate them and the efficiencies they can generate, and where possible to do so consistently with consumer welfare. We believe that competition between and among these global alliances is likely to play a critically important role in ensuring that consumers in this emerging environment have multiple competing options to travel where they wish as inexpensively and conveniently as possible.

TWA has asked us to conduct a public oral evidentiary hearing to evaluate the competition and public benefit arguments made by the Joint Applicants.[57] We find an oral evidentiary hearing unnecessary to resolve the relevant issues of fact. We believe that the record of this case is sufficiently complete to permit a thorough public interest evaluation, using non-oral hearing public comment procedures.

In this case, having tentatively determined that the overall competitive effect of the Alliance Agreements are beneficial and consistent with our international aviation policy, we believe that the public interest favors the grant of antitrust immunity. In so stating, of course, we will continue to monitor closely the effects of an immunized alliance on consumers and on competition, to ensure that the grant of immunity continues to serve the public interest.

### D. Tentative Grant of Antitrust Immunity

We have the discretion to grant antitrust immunity to agreements approved by us under section 41309 if we find that the immunization is required by the public interest.

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56 Order 92-8-13, August 5, 1992.

57 TWA Answer, at 29.

It is not our policy to confer antitrust immunity simply on the grounds that an agreement does not violate the antitrust laws. We are willing to make exceptions, however, and thus grant immunity if the parties to such an agreement would not otherwise go forward without it, and we find that grant of antitrust immunity is required by the public interest.

The Joint Applicants have stated that they are unlikely to proceed with the Alliance Agreements without antitrust immunity.[58] We agree. While we have found that the joint venture's overall effect will be pro-competitive as the record shows, that the Alliance Agreements may reduce competition in the markets where the applicants now provide competitive services under their respective blocked-space, code-share arrangements.[59] We recognize that in the confidential documents submitted by the Joint Applicants there is evidence indicating that the fear of antitrust liability has influenced the manner in which Delta and its foreign partners have operated in these markets. Thus, the potential antitrust liability for an agreement of this volume may deter the applicants from integrating their services as intended by the Alliance Agreements unless they have antitrust immunity.

The Joint Applicants maintain that the public benefits that the Alliance airlines seek to achieve through the formation of the Alliance cannot be accomplished absent antitrust immunity. They claim that the proposed integration of services will assuredly expose them to antitrust risk, since they fully intend to establish a common financial objective, permitting them to compete more effectively with other strategic alliances. Additionally, they point out that full operational integration will necessarily mean that they will coordinate all of their U.S.-Europe business activities including scheduling, route planning, pricing, marketing, sales, and inventory control. Since the antitrust laws allow competitors to engage in joint ventures that are procompetitive, we think it unlikely that the integration of the applicants' services would be found to violate the antitrust laws.[60]

We cannot agree with the claims of TWA and Tower that the applicants can already integrate their services to achieve the efficiency and consumer benefits we contemplate without a grant of antitrust immunity. While the applicants can integrate their services to some extent without immunity, the close form of alliance that they seek to create--and that Northwest and KLM created after we immunized their alliance from the antitrust laws--only appears to be possible in this case if the applicants have immunity. As one example, while some other carriers have closely coordinated their services without immunity, those arrangements presented no significant risk of antitrust liability because the partners did not compete on any nonstop routes; in contrast, as discussed above, Delta and its partners currently compete on several transatlantic routes.

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58 "The Joint Applicants categorically state that they will not carry out the collaboration, coordination and integration contemplated by the Alliance Agreement in the absence of antitrust immunity because of the substantial risk that the Joint Applicants will be subject to antitrust litigation." Joint Application at 42.

59 Cf. pp. 20-22,*supra*.

60 Cooperative arrangements between airlines are today commonplace. We are unaware of any holding that such arrangements violate the antitrust laws.

As required by section 41308, we also find that grant of antitrust immunity is required by the public interest. For the reasons given above, we tentatively find that the Alliance Agreement's implementation is likely to benefit the public, particularly since the integration of the joint applicants' operations should promote enhanced competition in the transatlantic marketplace and allow the airlines to provide better service and enable them to operate more efficiently. As a result, the joint applicants' request for antitrust immunity appears to meet the standards of section 41308.

To the extent discussed above, we tentatively find that antitrust immunity should be granted to the Alliance Agreements. We find that the proposed integration of services and operations among the joint applicants is pro-competitive. We also find that the benefits that are likely to result from the joint venture outweigh any potential loss of competition in the joint applicants various code-share markets, except as noted. At this time the joint applicants have not negotiated or executed definitive operating agreements.[61] We will review the applicants' progress in implementing those Agreements, if we approve and immunize them, in order to ensure that the joint applicants are carrying out the Agreements' pro-competitive aims. We will also require the joint applicants to resubmit the Agreements for review in five years, if we make final our tentative decision approve and immunize them.

## V. IATA Tariff Coordination Issue

We have tentatively decided to condition our grant of antitrust immunity to the Alliance upon the withdrawal by the joint applicants from IATA tariff coordination activities affecting through prices between the U.S. and Austria, Belgium, or Switzerland, as well as between the U.S. and any other country that has designated a carrier whose alliance with a U.S. carrier has been or is subsequently given immunity, or renewal thereof, by us.[62] Under this condition, the Alliance carriers may not participate in IATA tariff coordination activities affecting fares, rates and charges between the United States and Austria, Belgium, or Switzerland or between the United States and the homeland(s) of their similarly immunized alliance competitors. Through

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61 As a result, TWA urges, absent denial of the request for immunity, that we grant only discussion immunity to the applicants, and require them to submit their actual operating agreements for public comment and detailed review. We do not agree. We have already determined that this application is substantially complete. Additionally, we intend fully to review all subsidiary agreements.

62 As noted above, this condition tentatively would include coordination on prices between the U.S. and Germany by virtue of the conditional immunity proposed in Order 96-5-12, and between the U.S. and the Netherlands by virtue of the immunity previously granted to the Northwest-KLM Commercial Cooperation and Integration Agreement by Order 93-1-11 in Dockets 48342 and 46371. Although that grant of immunity did not contain a similar condition, it will be subject to review by the Department in early 1998. In the interim, Northwest and KLM have notified the Department by a letter included in this docket that they will accept and immediately implement any condition imposed on the joint applicants in this proceeding with respect to withdrawal from IATA tariff coordination activities.

prices between the U.S. and other countries, as well as all local fares in intermediate and beyond markets, tentatively would not be covered by the condition.[63]

We tentatively find that this condition is in the public interest for a number of reasons. The immunity requested in this proceeding includes broad coverage of price coordination activities between the joint applicants. With respect to internal Alliance needs, tariff coordination through the IATA conference mechanism is duplicative and unnecessary. At the same time, one of the reasons that we tentatively find supports immunity for the proposed Alliance activities is the potential for increased price competition between the Alliance carriers and other carriers, particularly other international alliances. We have tentatively found that such potential competition will, on balance, outweigh any potential anticompetitive effects of price coordination within the Alliance itself and encourage the passing on of economic efficiencies realized by the Alliance to consumers in the form of lower prices. Permitting the Alliance carriers to continue tariff coordination within IATA undermines such competition.

We are tentatively not persuaded by the arguments of the joint applicants that their current scope of participation in IATA is nonetheless justified, or by IATA's contention that we should consider any limitation on participation by carriers in IATA tariff coordination only in the context of its application for continued approval of and antitrust immunity for its Tariff Conference procedures in Docket 46928. Our condition is limited to prices between the United States and countries that have accepted the concept of competitive pricing and for whom the grant of alliance immunity to their carriers should be a reasonable substitute for broader IATA tariff conference participation, so long as competing immunized alliances are placed on an equal footing. Moreover, we tentatively find no basis for IATA's assertion that our condition would deprive other carriers of their ability to participate in the interline system. Participation in interline agreements, including the Standard Interline Traffic Agreement, is not a Tariff Conference function; participation in the agreements are not dependent on IATA membership or participation, and they would not be affected by our condition.

## VI. O&D Survey Data Reporting Requirement[64]

We have access to market data where our carriers operate, including markets that they serve jointly with foreign airlines, for example, the Department's Origin-Destination Survey of

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63 Under this condition, the Alliance carriers could not participate in IATA discussions of the total ("through") price (s*ee* 14 CFR § 221.4) between a U.S. point of origin or destination and an origin or destination in Austria, Belgium, Switzerland, Germany, the Netherlands, or the homeland of a carrier participant in an alliance immunized in the future, whether such prices are offered for direct, on-line or interline service. They could, however, discuss local segment prices, arbitraries or generic fare construction rules that have independent applicability outside such markets. IATA activities covered by our condition would include all those discussing prices proposed for agreement, including both meetings and exchanges of documents such as those preceding meetings and those used in mail votes.

64 We intend to provide confidentiality protection for these data, as we do for international data submitted by U.S. airlines. As we intend to use this data for internal monitoring purposes, we do not intend to release it to any other airlines, to avoid competitive problems.

Airline Passenger Traffic (O&D Survey). We have also collected special O&D Survey code-share reports for three large alliances, and have directed all other U.S. airlines to file reports for their transatlantic code-share operations beginning with the second quarter of 1996.

However, we receive no market information for passengers traveling to or from the U.S. when their entire trip is on foreign airlines, except for T-100(f) data for on-flight markets. Such passengers account for a substantial portion of all traffic between the U.S. and foreign cities, and the absence of such information severely handicaps our ability to evaluate the economic and competitive consequences of the decisions we must make.

We must also ensure that our grant of antitrust immunity does not lead to anticompetitive consequences. We have therefore tentatively decided to require Austrian, Sabena, and Swissair to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that contain a United States point (similar to the O&D Survey data already reported by Delta).[65]

## VII. Computer Reservations System (CRS) Issues

Another competitive issue concerns ownership interests that the various joint applicants have in a CRS that competes in the United States. Delta, through a subsidiary company, is a part owner of Worldspan, L.P., and Austrian and Swissair are part owners of Galileo. The record indicates that Sabena does not own an interest in a CRS.[66] As with the Northwest-KLM arrangement, the proposed integration of marketing operations of the joint applicants presents a risk that CRS competition may be reduced.

In view of these factors, we tentatively find that any grant of antitrust immunity for the Alliance Agreements should exclude the carriers' CRS interests and operations.

## VIII. Operation under a Common Name/Consumer Issues

Since operation of the Alliance Agreements could raise important consumer issues and "holding out" questions, if the joint applicants choose to operate under a common name or use "common brands," they will have to seek separate approval from the Department prior to such operations. For example, it is Department policy to consider the use of a single air carrier designator code by two or more carriers to be unfair and deceptive and in violation of the Act

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65 We intend to request other foreign carrier members of immunized international alliances involving U.S. carriers to submit O&D Survey Data and we intend to condition any further grants or renewals of antitrust immunity on provision of such data. We will treat the foreign carriers' O&D data as confidential, will not allow U.S. carriers any access to the data, and will not allow Austrian, Sabena, and Swissair any access to U.S. carrier O&D data.

66 Application at 7.

unless the air carriers give reasonable and timely notice to passengers of the actual operator of the aircraft.[67]

## IX. Summary

We tentatively conclude that granting the application for approval and antitrust immunity for the Alliance Agreements will benefit the public interest by enhancing service options available to travelers. We believe that the Alliance Agreements will strengthen competition in the markets that the applicants serve, since it will enable them to offer better service and to operate more efficiently. Furthermore, we expect that the Alliance Agreements and the proposed integration of the airlines operations will strengthen Delta's ability to compete effectively against existing alliances and the other major European airlines.

We tentatively conclude that our grant of approval and antitrust immunity to the Alliance Agreements should be conditioned, as set forth in this order. We will exclude from immunity, based on the Joint Applicants' agreement with DOJ, the proposed integration of services and operations between Atlanta and Brussels, between Atlanta and Zurich, and between Cincinnati and Zurich. In addition, consistent with the Joint Applicants' agreement with DOJ, we tentatively give antitrust immunity in these three hub-to-hub markets otherwise excluded from antitrust immunity, with respect to operations concerning passengers traveling on certain categories of restricted fares -- which include restrictions requiring a Saturday night stay or a minimum stay of seven days or more as a condition of the fare.

We also tentatively direct Delta, Swissair, Sabena, and Austrian to resubmit the pertinent Alliance Agreement five years from the date of the issuance of the final order in this case. However, the Department is not authorizing the Joint Applicants to operate under a common name or as "common brands". If the Joint Applicants wish to operate under a common name or as "common brands", they will have to comply with our relevant procedures before implementing the change.

As discussed, within 18 months we intend to review in cooperation with DOJ, the competitive operation of the four New York markets discussed herein to ensure that the effects of the immunity have been consistent with our pro-competitive and pro-consumer objectives.

We also tentatively direct the Joint Applicants as a condition to withdraw from all IATA tariff coordination activities relating to through prices between the United States and the homeland of each foreign alliance partner, as well as between the United States and the homeland of any other foreign carrier granted antitrust immunity or renewal thereof, by the Department for participation in similar alliance activities with a U.S. carrier; and file all subsidiary and/or subsequent agreement(s) with the Department for prior approval. We also tentatively direct Swissair, Sabena, and Austrian to report full-itinerary Origin-Destination Survey of Airline

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67 *See* 14 C.F.R. §399.88.

Passenger Traffic for all passenger itineraries that contain a United States point (similar to the O&D Survey data already reported by Delta).

Objections or comments to our tentative findings are due no later than 7 calendar days from the issue date of this order. Answers to objections shall be due no later than 3 calendar days thereafter.

**ACCORDINGLY:**

1. We direct all interested persons to show cause why we should not issue an order making final our tentative findings and conclusions, granting approval and antitrust immunity as discussed by this order to the Alliance Agreements among Delta Air Lines, Inc., Swissair, Swiss Air Transport Company, Ltd., Sabena S.A., Sabena Belgian World Airlines and Austrian Airlines, Österreichische Luftverkehrs AG and subject to the provisions that the antitrust immunity will not cover any activities of Delta, Swissair, and Austrian as owners of Worldspan and Galileo computer reservations systems businesses, and subject to the proposed limits and conditions indicated in Appendix A, and in ordering paragraph 3, to the extent that it applies to the Atlanta-Brussels, Atlanta-Zurich, and Cincinnati-Zurich markets, and subject to condition that the Joint Applicants shall not operate or hold out service under a common name or brand without obtaining prior approval from the Department;

2. We tentatively direct Delta Air Lines, Inc., Swissair, Swiss Air Transport Company, Ltd., Sabena S.A., Sabena Belgian World Airlines, and Austrian Airlines, Österreichische Luftverkehrs AG to resubmit their Alliance Agreements five years from the date of issuance of the final order in this case;

3. We tentatively direct interested persons to show cause why we should not further condition our grant of approval and immunity to require Delta Air Lines, Inc., Swissair, Swiss Air Transport Company, Ltd., Sabena S.A., Sabena Belgian World Airlines, and Austrian Airlines, Österreichische Luftverkehrs, AG to withdraw from participation in any International Air Transport Association (IATA) tariff coordination activities that discuss any proposed through fares, rates or charges applicable between the United States and Switzerland, Belgium, or Austria, and/or between the United States and any other countries designating a carrier granted antitrust immunity, or renewal thereof, for participation in similar alliance activities with a U.S. carrier;

4. We tentatively direct Swissair, Swiss Air Transport Company, Ltd., Sabena S.A., Sabena Belgian World Airlines, and Austrian Airlines, Österreichische Luftverkehrs, AG to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that include a United States point (similar to the O&D Survey data already reported by its alliance partner Delta Air Lines, Inc.);

5. We direct interested persons wishing to comment on our tentative findings and conclusions, or objecting to the issuance of the order described in ordering paragraphs 1-4 to file an original and five copies in Docket OST-95-618, and serve on all persons on the service

list in that docket, a statement of such objections or comments, together with any supporting evidence the commenter wishes the Department to notice, by 10:00 a.m. Tuesday, May 28, 1996. Answers to objections shall be due 10:00 a.m. Friday, May 31, 1996; [68]

6. If timely and properly supported objections are filed, we will afford full consideration to the matters or issues raised by the objections before we take further action. If no objections are filed, we will deem all further procedural steps to have been waived; and

7. We shall serve this order on all persons on the service list in this docket.

By:

**CHARLES A. HUNNICUTT**
Assistant Secretary for Aviation
and International Affairs

(SEAL)

*An electronic version of this document*
*will be made available on the World Wide Web at:*
*http://www.dot.gov/dotinfo/general/orders/aviation.html*

[68] Because of the expedited schedule of this proceeding, service should be by hand delivery or FAX. The original filing should be on 8½" by 11" white paper using dark ink and be unbound without tabs, which will expedite use of our docket imaging system.

# PROPOSED CONDITIONS GOVERNING THE ANTITRUST IMMUNITY FOR THE ALLIANCE AGREEMENTS BETWEEN DELTA AIR LINES, INC. SWISSAIR, SWISS AIR TRANSPORT COMPANY, LTD. SABENA, S.A., SABENA BELGIAN WORLD AIRLINES, AND AUSTRIAN AIRLINES, ÖSTERREICHISCHE LUFTVERKEHRS AG

## Grant of Immunity

The Department grants immunity from the antitrust laws to Delta Air Lines, Inc. and Swissair, Sabena, S.A. and Austrian Airlines, and their affiliates, for their Cooperation Agreements and Coordination Agreement (the "Alliance Agreements") dated September 8, 1995 between and among Delta, Swissair, Austrian and Sabena, and for any agreement incorporated in or pursuant to the Alliance Agreements.

## Limitations on Immunity

The foregoing grant of antitrust immunity shall not extend to the following activities by the parties: pricing, inventory or revenue management, or pooling of revenues with respect only to local U.S.-point-of-sale passengers flying scheduled nonstop service on Unrestricted Fares or on Corporate Fare Products between Atlanta and Zurich, Atlanta and Brussels and Cincinnati and Zurich, New York and Brussels, New York and Vienna, New York and Geneva, and New York and Zurich; or provision by one party to the other of more information concerning such current or prospective Unrestricted Fares or Corporate Fare Products or seat availability for such passengers than it makes available to airlines and travel agents generally.

## Exceptions to Limitations on Immunity

Despite the foregoing limitations, antitrust immunity shall extend to the joint development, promotion, sale, inventory/revenue management, pooling of revenue and other coordination activities by the parties of fares and bids for government travel or other traffic that either party is prohibited by law from carrying on service offered under its own code, Corporate Fare Products and Unrestricted Fares with respect to local U.S.-point-of-sale passengers flying nonstop between Atlanta and Zurich, Atlanta and Brussels and Cincinnati and Zurich, New York and Brussels, New York and Vienna, New York and Geneva, and New York and Zurich, provided that: (i) in the case of Corporate Fare Products, local U.S.-point-of-sale traffic on the nonstop Atlanta-Zurich, Atlanta-Brussels and Cincinnati-Zurich, New York-Brussels, New York-Vienna, New York-Geneva and New York-Zurich routes shall constitute no more than 25% (measured in revenues, bookings, flight segments or tickets) of a corporation's anticipated travel under its contract with Delta, Swissair, Sabena and/or Austrian and, (ii) in the case of Unrestricted Fares, the Unrestricted Fare must be a Promotional Fare Product, and the Promotional Fare Product must include similar fares for travel in at least 25 city pairs in addition to Atlanta-Zurich, Atlanta-Brussels, or Cincinnati-Zurich, New York-Brussels, New York-Vienna, New York-Geneva or New York-Zurich.

## Definitions for purposes of this Order

"Corporate Fare Products" means the offer of nonpublished fares at discounts from the otherwise applicable Unrestricted Fares to corporations or other entities for authorized travel, which discounts may be stated as percentage discounts from specified published Unrestricted Fares, net prices, volume discounts, or other forms of discount.

"Promotional Fare Products" means Unrestricted Fares that offer directly to the general public, for a limited time, discounts from current similar Unrestricted Fares.

"Unrestricted Fares" means published fares not requiring either a Saturday night stay or a minimum stay of seven days or more.

Clarification of scope of limitations on immunity

Under no circumstances shall the limitations on antitrust immunity set forth above be construed to limit the parties' antitrust immunity for activities jointly undertaken pursuant to the Alliance Agreements other than as specifically set forth in this Order. Immunized activities include, without limitation: decisions by the parties regarding the total number of frequencies and types of aircraft to operate on the Atlanta-Zurich, Atlanta-Brussels and Cincinnati-Zurich, New York-Brussels, New York-Vienna, New York-Geneva and New York-Zurich routes, the configuration and scheduling of such aircraft; coordination of pricing, marketing, sales, commissions, inventory and revenue management, and pooling of revenues, access to each other's internal reservations system, and other coordination activities, with respect to i) non-local or non-U.S.-point-of-sale passengers traveling on nonstop flights on the Atlanta-Zurich, Atlanta-Brussels and Cincinnati-Zurich, New York-Brussels, New York-Vienna, New York-Geneva and New York-Zurich routes, and ii) local passengers traveling on such routes other than local passengers traveling on Unrestricted Fares or Corporate Fare Products as described in "Limitations on Immunity" and not falling within the "Exceptions to Limitations on Immunity" set forth herein.

Review of limitations on immunity

Within eighteen months from the date that this Order become final, or at any time upon application of the parties, the Department will review the limitations on antitrust immunity set forth above to determine whether they should be discontinued or modified in light of: current competitive conditions in the Atlanta-Zurich, Atlanta-Brussels and Cincinnati-Zurich, New York-Brussels, New York-Vienna, New York-Geneva and New York-Zurich city pairs; the efficiencies to be achieved by the parties from further integration that would be made possible by discontinuation of the limitations on immunity, when balanced against any potential for harm to competition from such a discontinuation; regulatory conditions applicable to competing alliances; or other factors that the Department may deem appropriate.